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Supreme Court, U.S.
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Case-No. 94-992

In The
Supreme Court of the United States
October Term, 1994

DOU-HAN, INC., Florida Corporation,
Petitioner,

v.

THE CITY OF ST PETERSBURG
A Florida Municipal Corporation,
and ROBERT BUTTERWORTH,
the Attorney General of the State of Florida,
Respondents.

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR RESPONDENT IN OPPOSITION

By: CITY ATTORNEY'S OFFICE
CITY OF ST PETERSBURG, FLORIDA

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and

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17 pp

QUESTION PRESENTED

I. Whether an entity who has not applied for a variance from a zoning regulation is entitled to a presumption that the administrative body which would hear the request for a variance is not fair and impartial, and that the ordinance which designated the administrative body to hear the request should be declared unconstitutional.

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RULES:

Rule 9.100(c), Fla. R. App. P. 4

ORDINANCES:

Ordinance 72-G. 1, 2, 4

Ordinance 79-G 1, 3

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case with the following exceptions and corrections:

Respondent is unaware whether the books, magazines and video tapes which Petitioner offers to the public are obscene or not obscene but accepts the Petitioner's characterization that they are sexually explicit. Respondent is unaware of any constitutional requirement which requires a local government to provide an opportunity for businesses to seek variances from zoning regulations. The Respondent's Board of Adjustment does not have jurisdiction over all other variance applications under the City's zoning regulations, the Mayor, the Environmental Development Commission and the City Council have jurisdiction over variance applications in some situations.

The conclusion that the Mayor wished to close a "loophole" which might have resulted in the granting of a variance is not supported by the record. The statements of certain City Councilmembers cited in the Petition are taken from the transcripts of many hours of public hearings held during the legislative process to enact Ordinance 72-G, not the challenged Ordinance 79-G. These public hearings were held approximately one year prior to any hearing on a variance request. Petitioner did request a variance but the judgment appealed from was entered prior to a hearing on Petitioner's request for a variance. The City of St. Petersburg has eight Councilmembers.

SUMMARY OF ARGUMENT

Petitioner asked the Circuit Court to presume that possibly, at some time in the future, Respondent's City Council could not be an impartial tribunal and fairly apply the standards and criteria of Ordinance No. 72-G to Petitioner's request for a variance. Petitioner asked the Circuit Court to find that the City Council would violate its rights and on this basis asked the Circuit Court to declare unconstitutional an ordinance that delegates certain duties to the City Council. The Circuit Court dismissed this count of the Amended Complaint because the Plaintiff failed to exhaust its administrative remedies and because there was no need for declaratory relief because there was no present state of facts or controversy upon which to enter declaratory judgment. The presumption which Petitioner asks this Court to make is contrary to the presumption established by this Court that adjudicators will act with honesty and integrity. The lower court has not decided a federal question in a way that conflicts with another state court of last resort or a United States Court of Appeals and has not decided an important question of federal law which should be settled by this Court nor has it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. While the issue Petitioner framed may be of importance, it is not the issue which was before the lower court when it dismissed this count of Petitioner's Complaint.

ARGUMENT IN OPPOSITION

The petition for writ of certiorari should not be granted because there is absolutely no indication that the decision rendered by the Second District Court of Appeals for the State of Florida in this case conflicts with any decision of another state court of last resort or a United States Court of Appeals. Not only is there no conflict but no federal question or important question of federal law has been decided which should be addressed by this Court. It is particularly difficult to find any conflict since the Second District Court of Appeals affirmed without opinion. Petitioner's argument essentially revolves around Count III of its complaint which was dismissed for two reasons by the Circuit Court. The Circuit Court found that (1) Plaintiff failed to exhaust its administrative remedies and (2) there was no need for declaratory relief because there was not a present state of facts or present controversy upon which to enter a declaratory judgment finding the City's Ordinance 79-G unconstitutional.

Petitioner asks this Court to presume that all Councilmembers of the City of St. Petersburg from now until the end of time will not be fair and impartial in hearing requests for variances under this zoning regulation and on this basis asks this Court to declare Ordinance 79-G unconstitutional. He cites as support for this presumption brief statements of four Councilmembers (one of whom is no longer a Councilmember) made in the context of numerous hours of legislative hearings at which many members of

the public spoke concerning the adoption of Ordinance 72-G. Both the Circuit Court and the District Court of Appeal declined to make this presumption.

Respondent can find no cases which state that Respondent is constitutionally required to provide an opportunity for an entity to request a variance from a zoning ordinance. Nonetheless Ordinance 72-G provides for variances and provides standards and criteria to guide the City Council in determining whether to grant or deny a request for a variance. *Staton v. Mayer*, 552 F.2d 908 (10th Cir. 1977) distinguishes statements by a decision maker made on the merits of the case which comes before it and statements on policy issues, *Staton* at 914. None of the statements which Petitioner refers to were made during or concerning any request for a variance from the zoning regulation. All the statements were made during the legislative hearings adopting Ordinance 72-G. *Staton* goes on to say that, in that case, the legislature provided appellate remedies and that "...means are now available for an equitable solution protecting the right to a fair hearing" and that "...the appeal remedies can be used for a full review on the facts and a decision by other tribunals, if a challenge is made to the fairness of the tribunal and the new decision." In Florida, matters which are subject to quasi-judicial hearings, as these are, may be appealed by petition for writ of certiorari to the circuit court. Rule 9.100(c), Fla. R. App. P. If after its variance hearing Petitioner feels the City Council was not fair or impartial it may raise this issue in an appeal.

Generally a challenge to the constitutionality of a statute is to the statute either "as applied" or "on its face". In this case Petitioner does not allege that this statute is unconstitutional on its face or as applied, it argues that it is unconstitutional because it may be applied sometime in the future in an unconstitutional manner. Unfortunately for Petitioner this Court has not found that the possibility that an act may occur in the future is grounds to declare an ordinance unconstitutional. This Court has stated in *United States v. O'Brien*, 391 U.S. 367, 383, 88 S. Court 1673, 1982 (1968) that it is a "principle of constitutional law that Courts are not to strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." The statements which Petitioner recites merely show that some Councilmembers generally do not like this kind of business, not that they will treat Petitioner's variance request unfairly.

The presumption which Petitioner asks this Court to make is not supported by the law as set forth by this Court or the Supreme Court of the State of Florida. This Court has allowed this presumption to be made only in situations where "the adjudicator has a pecuniary interest in the outcome" and where "he has been the target of personal abuse or criticism from the party before him". *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Neither of these situations occur here. This Court in *Withrow* went on to say that Petitioner "must overcome a presumption of honesty and integrity in those serving as adjudicators" and must convince the Court that there is such a risk of actual bias or prejudgment that, as applied in this case, the

legislators creating laws cannot implement those laws fairly. *Withrow* at 47. See also *Porter County Chapter v. Nuclear Regulation Commission*, 606 F.2d 1363, 1371 (D.C. 1979).

The The Florida Supreme Court made much the same policy statement in *City of Pompano Beach v. Big Daddy's. Inc.*, 375 So.2d 281, 282 (Fla. 1979) when it found that "it is a fundamental tenant of municipal law that when a municipal ordinance of legislative character is challenged in Court, the motives of the commission and the reasons before it which induce the passage of the ordinance are irrelevant." In Florida the presumption exists that "public officials properly perform their duties in accordance with the law and it is incumbent upon those challenging such performance to overcome the presumption" *Hillsborough County Aviation Authority v. Taller and Cooper. Inc.*, 245 So.2d 100, 102 (Fla. 2d DCA 1071). See also *City of Miami v. Kaiser*, 213 So.2d 449, 452 (Fla. 3rd DCA, 1968) (in the absence of sufficient showing to the contrary it is presumed that elected officials will perform their duties in a proper and lawful way manner). *Boardman v. Esteva*, 323 So.2d 259, 268, (Fla. 1976), (elected officials are presumed to perform their duties in a proper and lawful manner in the absence of a sufficient showing to the contrary). *Williams v. Smith*, 360 So.2d 417, 421 (Fla. 1978) (legislators are sworn to uphold the Constitution and are presumed to act in a lawful manner). And finally, in *Harden v. Garrett*, 483 So.2d 409, 410 (Fla. 1985) the Court stated that "If the principal of separation of powers is to be given any meaning or vitality whatsoever, it must mean that each of the branches of government, co-equal in constitutional

dignity, can trust the others to perform their assigned functions properly and conscientiously".

In this case the Circuit Court declined to presume that the City Council would not be a fair and impartial tribunal at some time in the future. The Second District Court of Appeal affirmed this finding. The presumption which Petitioner requested these courts to make this directly contrary to both federal and Florida Law. The presumption is, and should continue to be, that elected officials will perform their duties in accordance with the law. If they fail to act in accordance with the law, this can be corrected on appeal.

CONCLUSION

The petition for writ of certiorari should not be granted because there is absolutely no indication that the decision rendered by the Second District Court of Appeals for the State of Florida in this case conflicts with any decision of another state court of last resort or a United States Court of Appeals. Not only is there no conflict but no federal question or important question of federal law has been decided which should be addressed by this Court. Not only is there no conflict but no federal question or important question of federal law has been decided which should be addressed by this Court.